

§ 802.2

16 CFR Ch. I (1–1–03 Edition)

“A’s” research and development needs. Pursuant to the contract, “B” will also purchase all of the equipment that “A” formerly used to perform its own research and development activities. The sale of the equipment is not an exempt transaction under § 802.1(d)(3) because “A” is not replacing the productive capacity of the equipment being sold. The sale is also not exempt under § 802.1(d)(4), because functions such as research and development and testing are not management and administrative support services of a company but are integral to the design, development or production of the company’s products.

12. “A,” an automobile manufacturer, is discontinuing its manufacture of metal seat frames for its cars. “A” enters into a contract with “B,” a manufacturer of various fabricated metal products, to sell its seat frame production lines and to purchase from “B” all of its metal seat frame needs for the next five years. This transfer of productive capacity by “A” is not exempt pursuant to § 802.1(d)(3), since “A” is not replacing the productive capacity of the equipment being sold. The acquisition is also not exempt under § 802.1(d)(4). “A’s” sale of production lines is not the transfer of goods that provide management and administrative services to support the business operations of “A”; this manufacturing equipment is an integral part of “A’s” production operations.

[61 FR 13684, Mar. 28, 1996, as amended at 66 FR 8691, Feb. 1, 2001]

§ 802.2 Certain acquisitions of real property assets.

(a) *New facilities.* An acquisition of a new facility shall be exempt from the requirements of the act. A new facility is a structure that has not produced income and was either constructed by the acquired person for sale or held at all times by the acquired person solely for resale. The new facility may include realty, equipment or other assets incidental to the ownership of the new facility. In an acquisition that includes a new facility, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(b) *Used facilities.* An acquisition of a used facility shall be exempt from the requirements of the act if the facility is acquired from a lessor that has held title to the facility for financing purposes in the ordinary course of the lessor’s business by a lessee that has had sole and continuous possession and use of the facility since it was first built as a new facility. The used facility may

include realty, equipment or other assets associated with the operation of the facility. In an acquisition that includes a used facility that meets the requirements of this paragraph, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were acquired in a separate transaction.

(c) *Unproductive real property.* An acquisition of unproductive real property shall be exempt from the requirements of the act. In an acquisition that includes unproductive real property, the transfer of any assets that are not unproductive real property shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(1) Subject to the limitations of (c)(2), unproductive real property is any real property, including raw land, structures or other improvements (but excluding equipment), associated production and exploration assets as defined in § 802.3(c), natural resources and assets incidental to the ownership of the real property, that has not generated total revenues in excess of \$5 million during the thirty-six (36) months preceding the acquisition.

(2) Unproductive real property does not include the following:

(i) Manufacturing or non-manufacturing facilities that have not yet begun operation;

(ii) Manufacturing or non-manufacturing facilities that were in operation at any time during the twelve (12) months preceding the acquisition; and

(iii) Real property that is either adjacent to or used in conjunction with real property that is not unproductive real property and is included in the acquisition.

(d) *Office and residential property.* (1) An acquisition of office or residential property shall be exempt from the requirements of the act. In an acquisition that includes office or residential property, the transfer of any assets that are not office or residential property shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

(2) Office and residential property is real property that is used primarily for

office or residential purposes. In determining whether real property is used primarily for office or residential purposes, all real property, the acquisition of which is exempt under another provision of the act and these rules, shall be excluded from the determination. Office and residential property includes:

- (i) Office buildings,
- (ii) Residences,
- (iii) Common areas on the property, including parking and recreational facilities, and
- (iv) Assets incidental to the ownership of such property, including cash, prepaid taxes or insurance, rental receivables and the like.

(3) If the acquisition includes the purchase of a business conducted on the office and residential property, the transfer of that business, including the space in which the business is conducted, shall be subject to the requirements of the act and these rules as if such business were being transferred in a separate acquisition.

(e) *Hotels and motels.* (1) An acquisition of a hotel or motel, its improvements such as golf, swimming, tennis, restaurant, health club or parking facilities (but excluding ski facilities), and assets incidental to the ownership and operation of the hotel or motel (e.g., prepaid taxes or insurance, management contracts and licenses to use trademarks associated with the hotel or motel being acquired) shall be exempt from the requirements of the act. In an acquisition that includes a hotel or motel, the transfer of any assets that are not a hotel or motel, its improvements such as golf, swimming, tennis, restaurant, health club or parking facilities (but excluding ski facilities) and assets incidental to the ownership of the hotel or motel, shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(2) Notwithstanding paragraph (1) of the section, an acquisition of a hotel or motel that includes a gambling casino shall be subject to the requirements of the act and these rules.

(f) *Recreational land.* An acquisition of recreational land shall be exempt from the requirements of the act. Recreational land is real property used pri-

marily as a golf course or a swimming or tennis club facility, and assets incidental to the ownership of such property. In an acquisition that includes recreational land, the transfer of any property or assets that are not recreational land shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(g) *Agricultural property.* An acquisition of agricultural property and assets incidental to the ownership of such property shall be exempt from the requirements of the act. Agricultural property is real property that primarily generates revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs (activities within NAICS sector 11).

(1) Agricultural property does not include either:

(i) Processing facilities such as poultry and livestock slaughtering, processing and packing facilities; or

(ii) Any real property and assets either adjacent to or used in conjunction with processing facilities that are included in the acquisition.

(2) In an acquisition that includes agricultural property, the transfer of any assets that are not agricultural property or assets incidental to the ownership of such property (cash, prepaid taxes or insurance, rentals receivable and the like) shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

(h) *Retail rental space; warehouses.* An acquisition of retail rental space (including shopping centers) or warehouses and assets incidental to the ownership of retail rental space or warehouses shall be exempt from the requirements of the act, except when the retail rental space or warehouse is to be acquired in an acquisition of a business conducted on the real property. In an acquisition that includes retail rental space or warehouses, the transfer of any assets that are neither retail rental space nor warehouses shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

Examples. 1. "A," a major automobile manufacturer, builds a new automobile plant in

§ 802.2

16 CFR Ch. I (1–1–03 Edition)

anticipation of increased demand for its cars. The market does not improve and “A” never occupies the facility. “A” then sells the facility, which is fully equipped and ready for operation, to “B,” another automobile manufacturer. The acquisition of this plant, including any equipment and assets associated with its operation, is not exempt as an acquisition of a new facility, even though the facility has not produced any income, since “A” did not construct the facility for sale or hold it at all times solely for resale. Also, the acquisition is not exempt as an acquisition of unproductive property, because manufacturing facilities that have not yet begun operations are explicitly excluded from that exemption.

2. B, a subsidiary of “A,” a financial institution, acquired a newly constructed power plant, which it leased to “X” pursuant to a lease financing arrangement. “A’s” acquisition of the plant through B was exempt under § 802.63(a) as a bona fide credit transaction entered into in the ordinary course of “A’s” business. “X” operated the plant as sole lessee for the next eight years and now proposes to exercise an option to buy the plant for \$62 million. “X’s” acquisition of the plant is exempt pursuant to § 802.2(b). The plant is being acquired from B, the lessor, which held title to the plant for financing purposes, and the purchaser, “X,” has had sole and continuous possession and use of the plant since its construction.

3. “A” proposes to acquire a \$200 million tract of wilderness land from “B.” Copper deposits valued at \$57 million and timber reserves valued at \$60 million are situated on the land and will be conveyed as part of this transaction. During the last three fiscal years preceding the sale, the property generated \$50,000 from the sale of a small amount of timber cut from the reserves two years ago. “A’s” acquisition of the wilderness land from “B” is exempt as an acquisition of unproductive real property because the property did not generate revenues exceeding \$5 million during the thirty-six months preceding the acquisition. The copper deposits and timber reserves are by definition unproductive real property and, thus, are not separately subject to the notification requirements.

4. “A” proposes to purchase from “B” for \$140 million an old steel mill that is not currently operating to add to “A’s” existing steel production capacity. The mill has not generated revenues during the 36 months preceding the acquisition but contains equipment valued at \$56 million that “A” plans to refurbish for use in its operations. “A’s” acquisition of the mill and the land on which it is located is exempt as unproductive real property. However, the transfer of the equipment and any assets other than the unproductive property is not exempt and is sepa-

rately subject to the notification requirements of the act.

5. “A” proposes to purchase two downtown lots, Parcels 1 and 2, from “B” for \$70 million. Parcel 1, located in the southwest section, contains no structures or improvements. A hotel is located in the northeast section on Parcel 2, and it has generated \$9 million in revenues during the past three years. The purchase of Parcel 1 is exempt if it qualifies as unproductive real property, i.e., it has not generated annual revenues in excess of \$5 million in the three fiscal years prior to the acquisition. Parcel 2 is not unproductive real property, but its acquisition is exempt under § 802.2(e) as the acquisition of a hotel.

6. “A” plans to purchase from “B,” a manufacturer, a newly-constructed building that “B” had intended to equip for use in its manufacturing operations. “B” was unable to secure financing to purchase the necessary equipment and “A,” also a manufacturer, will be required to invest approximately \$50 million in order to equip the building for use in its production operations. This building is not a new facility under § 802.2 (a), because it was not constructed or held by “B” for sale or resale. However, the acquisition of the building qualifies for exemption as unproductive real property pursuant to § 802.2(c)(1). The building is not yet a manufacturing facility since it does not contain equipment and requires significant capital investment before it can be used as a manufacturing facility.

7. “A” proposes to purchase from “B,” for \$60 million, a 100 acre parcel of land that includes a currently operating factory occupying 10 acres. The other 90 adjoining acres are vacant and unimproved and are used by “B” for storage of supplies and equipment. The factory and the unimproved acreage have fair market values of \$32 million and \$28 million, respectively. The transaction is not exempt under § 802.2(c) because the vacant property is adjacent to property occupied by the operating factory. Moreover, if the 90 acres were not adjacent to the 10 acres occupied by the factory, the transaction would not be exempt because the 90 acres are being used in conjunction with the factory being acquired and thus are not unproductive property.

8. “X” proposes to buy a five-story building from “Y.” The ground floor of this building houses a department store, and “X” currently leases the third floor to operate a medical laboratory. The remaining three floors are used for offices. “X” is not acquiring the business of the department store. Because the ground floor is rental retail space, the acquisition of which is exempt under § 802.2(h), this part of the building is excluded from the determination of whether the building is used primarily for office purposes. The laboratory is therefore the only non-office

use, and, since it makes up 25 percent of the remainder of the building, the building is used 75 percent for offices. Thus the building qualifies as an office building and its acquisition is therefore exempt under § 802.2(d).

9. “A” intends to acquire three shopping centers from “B” for a total of \$180 million. The anchor stores in two of the shopping centers are department stores, the businesses of which “A” is buying from “B” as part of the overall transaction. The acquisition of the shopping centers is an acquisition of retail rental space that is exempt under § 802.2(h). However, “A’s” acquisition of the department store businesses, including the portion of the shopping centers that the two department stores being purchased occupy, are separately subject to the notification requirements. If the value of these assets exceeds \$50 million, “A” must comply with the requirements of the act for this part of the transaction.

10. “A” wishes to purchase from “B” a parcel of land for \$67 million. The parcel contains a race track and a golf course. The golf course qualifies as recreational land pursuant to § 802.2(f), but the race track is not included in the exemption. Therefore, if the value of the race track is more than \$50 million, “A” will have to file notification for the purchase of the race track.

11. “A” intends to purchase a poultry farm from “B.” The acquisition of the poultry farm is a transfer of agricultural property that is exempt pursuant to § 802.2(g). If, however, “B” has a poultry slaughtering and processing facility on his farm that is included in the acquisition, “A’s” acquisition of the farm is not exempt as an acquisition of agricultural property because agricultural property does not include property or assets adjacent to or used in conjunction with a processing facility that is included in an acquisition.

12. “A” proposes to purchase the prescription drug wholesale distribution business of “B” for \$80 million. The business includes six regional warehouses used for “B’s” national wholesale drug distribution business. Since “A” is acquiring the warehouses in connection with the acquisition of “B’s” prescription drug wholesale distribution business, the acquisition of the warehouses is not exempt.

[61 FR 13686, Mar. 28, 1996, as amended at 66 FR 8692, Feb. 1, 2001; 66 FR 23565, May 9, 2001; 67 FR 11903, Mar. 18, 2002]

§ 802.3 Acquisitions of carbon-based mineral reserves.

(a) An acquisition of reserves of oil, natural gas, shale or tar sands, or rights to reserves of oil, natural gas, shale or tar sands together with associated exploration or production assets

shall be exempt from the requirements of the act if the value of the reserves, the rights and the associated exploration or production assets to be held as a result of the acquisition does not exceed \$500 million. In an acquisition that includes reserves of oil, natural gas, shale or tar sands, or rights to reserves of oil, natural gas, shale or tar sands and associated exploration or production assets, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(b) An acquisition of reserves of coal, or rights to reserves of coal and associated exploration or production assets, shall be exempt from the requirements of the act if the value of the reserves, the rights and the associated exploration or production assets to be held as a result of the acquisition does not exceed \$200 million. In an acquisition that includes reserves of coal, rights to reserves of coal and associated exploration or production assets, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(c) Associated exploration or production assets means equipment, machinery, fixtures and other assets that are integral and exclusive to current or future exploration or production activities associated with the carbon-based mineral reserves that are being acquired. Associated exploration or production assets do not include the following:

(1) Any pipeline and pipeline system or processing facility which transports or processes oil and gas after it passes through the meters of a producing field located within reserves that are being acquired; and

(2) Any pipeline or pipeline system that receives gas directly from gas wells for transportation to a natural gas processing facility or other destination.

Examples: 1. “A” proposes to purchase from “B” for \$550 million gas reserves that are not yet in production and have not generated any income. “A” will also acquire from “B” for \$280 million producing oil reserves and associated assets such as wells, compressors, pumps and other equipment. The acquisition of the gas reserves is exempt as a transfer of